

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

BEFORE THE CHIEF PROCUREMENT
OFFICER FOR CONSTRUCTION

IN THE MATTER OF: BID PROTEST
BIRCHWOOD DORM RENOVATIONS
STATE PROJECT N12-9530-RC-D
M. A. ROZBITSKY CONSTRUCTION CO.
vs.
SOUTH CAROLINA DEPARTMENT OF
JUVENILE JUSTICE

DECISION

POSTING DATE: January 5, 2004

This matter is before the Chief Procurement Officer for Construction (CPOC) pursuant to a request from M. A. Rozbitsky Construction Company ("MAR") under the provisions of §11-35-4210 of the South Carolina Consolidated Procurement Code ("Code"), for an administrative review on the Birchwood Dorm Renovations project ("Project") for the South Carolina Department of Juvenile Justice ("DJJ"). Pursuant to §11-35-4210(3) of the Code, the CPOC evaluated the issues for potential resolution by mutual agreement and determined that mediation was not appropriate. A decision is issued without a formal hearing after a thorough review of the bidding documents and the applicable law.

NATURE OF THE PROTEST

On September 29, 2003 DJJ solicited bids for the Project in *South Carolina Business Opportunities*. [Exh.1] On October 23, 2003 three bids were received, opened and tabulated. [Exh.2] On October 27, 2003 DJJ posted a Notice of Intent to Award in favor of Ideal Construction Company, Inc. ("Ideal"), as the lowest responsive and responsible bidder. [Exh. 3] On November 4, 2003 MAR filed a protest with the Office of State Engineer. [Exh. 4] Two grounds of protest were alleged by MAR:

1. Ideal failed to include, within its bid envelope, a signed "Contractor Conduct Agreement" ("Conduct Agreement"). Ideal was allowed 24 hours to submit the signed form. MAR contends submission of this agreement was an essential element of the bid and Ideal should not have been allowed to cure this deficiency. MAR asks that Ideal's bid be declared non-responsive on this ground.

2. MAR objects to the method of determining the apparent low bidder, in that the result, assuming Ideal's bid is responsive, is that DJJ is not awarding to the lowest bidder for the work actually contracted.

FINDINGS OF FACT

1. The original Project Manual contains a three-page Conduct Agreement. [Exh. 5] This Conduct Agreement is not otherwise described or referred to in the original Project Manual.
2. On October 17, 2003 DJJ issued Addendum 1 to the Bidding Documents for the Project. [Exh. 6]. On page 2 of Addendum 1, under the paragraph summarizing the comments of Mark Cotter ("Cotter"), the DJJ Project Manager, the following statement is made:

Reference to the Contractor Conduct Agreement—no contact is to be made with Juveniles. The Contractor Conduct Agreement shall be submitted with the SE-330 Bid Form.

3. The original Project Manual contains the document (by reference) "A701-1997 Instructions to Bidders" ("A701"). This document contains the following definition:

1.6 An Alternate Bid (or Alternate) is an amount stated in the Bid to be added to or deducted from the amount of the Base Bid if the corresponding change in the Work, as defined in the Bidding Documents, is accepted.

4. The original Project Manual contains the document "00201-OSE Standard Supplemental Instructions to Bidders" ("00201"). This document contains the following description of the method used to evaluate bid alternates:

5.4.2 EVALUATION OF BID ALTERNATES. In order to establish a clear and definitive basis of award when the Bidding Documents include Bid Alternates, the following process shall be used.

5.4.2.1 When, and only when Bid Alternates are included in the Bid Documents, the Apparent Low Bidder will be determined by combining each Bidder's Base Bid amount and the total amount for all Bid Alternates. The Bidder who bids the lowest total price for the Base Bid and Bid Alternates, shall be deemed the apparent low bidder.

5.4.2.2 Provided that the Agency determines the Apparent Low Bidder to be both responsive and responsible, the Agency shall have the right to award a contract to the Apparent Low Bidder based on any combination of Bid Alternates or no Alternates, unless otherwise specifically provided in the Bidding Documents.

5. Section 01230 of the Bidding Documents defines Alternate Number One as follows:

2.01 ALTERNATE NUMBER ONE

State the amount to replace part of the steel ceiling with Hi-Impact Gypsum board as shown on drawing A8.1, see specification section 09251 and section 09254.

DISCUSSION

PROTEST ELEMENT ONE–THE SECURITY FORM

MAR contends that DJJ, by its statements at the pre-bid meeting and by issuance of Addendum No. 1, made the submission of the Conduct Agreement an item of responsiveness. DJJ states that Ideal's omission of the signed form with its bid package had no impact on the cost of performance and accordingly was a minor informality under §11-35-1520(13) of the Code and therefore subject to cure or waiver. The CPOC agrees with DJJ.

Section 11-13-1520(13) states:

(13) Minor Informalities and Irregularities in Bids. A minor informality or irregularity is one which is merely a matter of form or is some immaterial variation from the exact requirements of the invitation for bids having no effect or merely a trivial or negligible effect on total bid price, quality, quantity, or delivery of the supplies or performance of the contract, and the correction or waiver of which would not be prejudicial to bidders.

Having found that the irregularity is indeed minor, the procurement officer is further directed in §11-35-1520(13) as follows:

The procurement officer shall either give the bidder an opportunity to cure any deficiency resulting from a minor informality or irregularity in a bid or waive any such deficiency when it is to the advantage of the State. Such communication or determination shall be in writing.

Section 11-35-1520(13) then concludes with a non-exclusive list of bid irregularities that are considered minor informalities.

In reviewing the Conduct Agreement, the CPOC finds that a prospective contractor is required to do three things: (1) avoid contact with juveniles; (2) maintain effective control of his equipment and materials; and, (3) maintain a clean and secure work site. With the possible exception of item (1), the CPOC views these requirements as no more than sound and safe management practices. In any event, MAR submitted no evidence and the CPOC can see none, that the implementation of these requirements on this Project¹ would have more than a "...trivial or negligible effect on

¹ This finding should not be interpreted to state that every document limiting the prospective contractor's access to and freedom of the work site would be considered a minor informality.

total bid price,...or performance of the contract...". Accordingly, the CPOC finds that the DJJ procurement officer acted within his statutory authority to allow Ideal to correct the irregularity.

PROTEST DENIED

PROTEST ELEMENT TWO—THE DETERMINATION OF THE LOW BIDDER

MAR protests the award to Ideal on the grounds that the amount awarded is not the lowest possible price, due to the method of determining the apparent low bidder as defined in paragraph 5.4.2 of the 00201. It should be recognized that MAR's protest is against the results of the process of bid evaluation and award. As required by §11-35-1520(6), that process was defined in the original bidding documents.

(6) Bid Acceptance and Bid Evaluation. Bids shall be accepted unconditionally without alteration or correction, except as otherwise authorized in this code. The invitation for bids shall set forth the evaluation criteria to be used. No criteria may be used in bid evaluation that are not set forth in the invitation for bids. Bids shall be evaluated based on the requirements set forth in the invitation for bids and in accordance with the regulations of the board.

While the CPOC is sympathetic to the fact that the proposed contract appears to be more costly than a similar contract with MAR², the State is legally and ethically bound to follow its own rules, even in the face of situations where an agency is ultimately required to spend more than it otherwise might.³ While MAR submitted no evidence that DJJ failed to follow the arithmetic process defined in paragraph 5.4.2 of the 00201, the more fundamental question is whether DJJ made it possible for the bid evaluation process to function as intended. A careful reading of the Bidding Documents shows that DJJ did not.

Agencies and their consultants are required to develop their bidding documents in conformance to the requirements of the *Manual for Planning and Execution of State Permanent Improvements—Part II* ("OSE Manual"). S.C. Code Ann. §11-35-3240. Paragraph 5.17 of the OSE Manual describes the role of bid alternates, as follows:

5.17 ALTERNATES TO THE BASE BID

² Having reviewed the bid tabulation, the CPOC believes that MAR's bid may contain either a material error or is materially unbalanced. In either case, the acceptability of MAR's bid is uncertain. The CPOC sought additional information from MAR without response.

³ The CPOC notes that this unfortunate result might have been avoided if DJJ and its design consultant had complied with OSE's direction to use additive alternates only, so that the combination of base bid and all alternates accurately reflected the lowest price for the maximum scope of work the agency intended to purchase.

- A. *Alternates are changes in the project scope or use of alternate materials, methods of construction, systems or designs. They are bid concurrently with the Base Bid, and should be used only to obtain bid prices **on reasonable additional work that the Agency may desire to procure in the event a Base Bid is lower than estimated.***
- B. *It is the responsibility of the Agency and the A/E to cooperate during the design process so that the Bidding Documents have a Base Bid scope of work that meets the Agency's programmatic and budgetary requirements. **Bid Alternates should be viewed as optional enhancements to the project scope, not essential features. [emphasis added]***

It is the State's desire to obtain the maximum amount of work within the limits of its available funds. It is also the State's desire to ensure that the bidding process will result in the award of a contract that meets or exceeds the minimum programmatic goals of the project. To serve both ends, the OSE Manual directs agencies to prepare a Base Bid package that meets the minimum needs of the agency, with the Bid Alternates comprising the maximum scope of work the agency intends to purchase. When each Bid Alternate adds to the scope of the project, the bid evaluation process of paragraph 5.4.2 of the 00201 works as intended to identify that bidder who submitted the lowest total price for the maximum scope of work.

By issuing Bidding Documents that included a deductive alternate—that is, one that reduces the scope of the work (in this case, by substituting less durable ceiling material), DJJ did not comply with the requirements of the OSE Manual. By this action, DJJ made it impossible to simultaneously comply with the requirements to: (1) identify that bidder offering the lowest price for the maximum scope of work; and, (2) to do so by application of the bid evaluation process of paragraph 5.4.2 of the 00201. The Bidding Documents as issued by DJJ were fatally defective.

PROTEST SUSTAINED

REMEDY

The remedies available to a protestant depend on when – relative to an award – the protest is decided. When the protest is decided before a contract is entered, i.e., prior to award, the remedies of section 11-35-4310(2) apply. When the protest is decided after a contract is entered, i.e., after award, the remedies of §11-35-4310(3) apply:

SECTION 11-35-4310. Solicitations or awards in violation of the law.

.....

*(2) Remedies Prior to Award. If, **prior to award of a contract**, it is determined that a solicitation or proposed award of a contract is in violation of law, then **the solicitation or proposed award may be:***

- (a) canceled;*
 - (b) revised to comply with the law and rebid; or*
 - (c) awarded in a manner that complies with the provisions of this code.*
 - (3) Remedies After Award. If, **after an award of a contract**, it is determined that the solicitation or award is in violation of law;*
 - (a) **the contract may be** ratified and affirmed, provided it is in the best interests of the State; or*
 - (b) **the contract may be** terminated and the payment of such damages, if any, as may be provided in the contract, may be awarded.*
- [emphasis added]**

The Panel affirmed this interpretation in Protest of Business Systems of South Carolina, Inc., Case No. 2002-3.

Ordinarily, the pre-award remedies of paragraph (2) apply because the automatic stay of section 11-35-4210(7) preserves the status quo by staying further action on the procurement until such time as the administrative protest process is complete. However, in this case, a contract has already been entered and performance begun; pursuant to a request from DJJ, the CPOC, under the authority of §11-35-4210(7) of the Code, lifted the automatic stay and permitted the immediate award of a contract to Ideal.⁴ Accordingly, the CPOC can either terminate the state's existing contract and award any appropriate damages to the contractor (Ideal) or ratify and affirm the existing contract despite the defect in the procurement process. For the selfsame reasons that supported the decision to lift the automatic stay, the CPOC finds it would not be in the best interest of the State to terminate an active contract. Accordingly, the contract between Ideal Construction and the South Carolina Department of Juvenile Justice is hereby ratified and affirmed.

Having sustained MAR's protest of a contract awarded to another, the issue of entitlement to costs, under §11-35-4310(4) of the Code, arises. Under this section, the CPOC has the discretion to award a "reasonable reimbursement amount, including reimbursement of its reasonable bid preparation costs." However, such relief is only available when "it is determined that the protesting bidder or offeror should have been awarded the contract under the solicitation but is not" In this case, the basis for the success of the protest is that the Bidding Documents were defective and cannot be used to correctly determine apparent low bidder. Consequently, no costs can be awarded.

DECISION

Protest issue number one is denied. Protest issue number two is sustained. The award is hereby ratified and affirmed. No costs are awarded.

A handwritten signature in black ink that reads "Michael M. Thomas". The signature is fluid and cursive, with the first letters of each word being capitalized and prominent.

Michael M. Thomas
Chief Procurement Officer
for Construction

January 5, 2004
Date

⁴ A copy of the CPOC's determination to lift the stay is hereby attached and made a part of this decision. The determination was not appealed.

STATEMENT OF THE RIGHT TO APPEAL

The South Carolina Procurement Code, under Section 11-35-4210, subsection 6, states:

A decision under subsection (4) of this section shall be final and conclusive, unless fraudulent, or unless any person adversely affected by the decision requests a further administrative review by the Procurement Review Panel under Section 11-35-4410(1) within ten calendar days of posting of the decision in accordance with Section 11-35-4210(5). The request for review shall be directed to the appropriate chief procurement officer, who shall forward the request to the Panel, or to the Procurement Review Panel and shall be in writing, setting forth the reasons why the person disagrees with the decision of the appropriate chief procurement officer. The person may also request a hearing before the Procurement Review Panel.

Additional information regarding the protest process is available on the internet at the following web site: <http://www.state.sc.us/mmo/legal/lawmenu.htm>

NOTE: Pursuant to Proviso 66.1 of the 2002 General Appropriations Act, "[r]equests for administrative review before the South Carolina Procurement Review Panel [filed after June 30, 2002] shall be accompanied by a filing fee of two hundred and fifty dollars (\$250.00), payable to the SC Procurement Review Panel. The panel is authorized to charge the party requesting an administrative review under the South Carolina Code Sections 11-35-4210(6), 11-35-4220(5), 11-35-4230(6) and/or 11-35-4410(4). . . . Withdrawal of an appeal will result in the filing fee being forfeited to the panel. If a party desiring to file an appeal is unable to pay the filing fee because of hardship, the party shall submit a notarized affidavit to such effect. If after reviewing the affidavit the panel determines that such hardship exists, the filing fee shall be waived." 2002 S.C. Act No. 289, Part IB, § 66.1 (emphasis added). PLEASE MAKE YOUR CHECK PAYABLE TO THE "SC PROCUREMENT REVIEW PANEL."